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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ANTHONY DASHAUN BROWN,<br><br>Defendant and Appellant. | B236686<br><br>(Los Angeles County<br>Super. Ct. No. MA 052154) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed with directions.

Gail Ganaja, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Anthony Dashaun Brown appeals from a conviction for five counts of resisting an executive officer. He contends (1) this court should conduct an independent review of the in camera *Pitchess*[1] hearing; (2) the trial court erred in not instructing the jury with the definition of "unlawful use of force or violence"; (3) the trial court erred when it admitted a recorded 911 call; (4) the trial court erred in admitting evidence that appellant was subject to a warrant at the time of his arrest; and (5) the trial court miscalculated his presentence conduct credits under Penal Code section 4019.[2] Respondent does not object to our independent review of the *Pitchess* hearing but disagrees with appellant's other contentions. Additionally, respondent contends that the court should amend the abstract of judgment to correct certain fees and fines. We agree with respondent that the abstract of judgment should be corrected, but in all other respects, we affirm.

**PROCEDURAL HISTORY**

Appellant was charged with assault upon a peace officer (§ 245, subd. (c); count 1) and five counts of resisting an executive officer (§ 69; counts 2-6). It was further alleged that appellant had suffered a prior strike under the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and had served a prior prison term within the meaning of section 667.5, subdivision (b).

A jury found appellant not guilty of assault upon a peace officer and the lesser included offense of simple assault but guilty of the five counts of resisting an executive officer. Appellant admitted the prior conviction allegations. The trial court sentenced appellant to state prison for a total of seven years eight months. Appellant was arrested on March 10, 2011, and sentenced on October 12, 2011. He was accordingly credited with 325 days of custody, consisting of 217 days of actual time and 108 days of conduct credit. He filed a timely notice of appeal.

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

2 All further statutory references, unless noted otherwise, are to the Penal Code.

## STATEMENT OF FACTS

Early in the morning of March 10, 2011, Los Angeles sheriff's deputies responded to a family disturbance 911 call. The caller, Kevin Anderson, reported that his nephew was damaging property in the house. When deputies arrived, Anderson, appearing scared, reported that his nephew was in the back bedroom. Deputy Alex Smith questioned appellant and appellant admitted he was not authorized to be in the house. The deputy suspected appellant was under the influence of a controlled substance. When the deputies attempted to place appellant under arrest, he ran out of the bedroom. The deputies struggled with appellant and appellant kicked at Deputy Scott Woods's hands and upper-body area. Appellant also tried to bite Deputy Smith on the left arm. Appellant freed himself and ran out of the house. Following another struggle at a nearby trailer with Deputies Wesley Guthrie, R. Catalan, and J. Busch, the deputies were able to arrest appellant after using a taser on him.

## DISCUSSION

### *1. The* Pitchess *Hearing*

Appellant filed a *Pitchess* motion before trial requesting discovery of personnel information relating to the five deputies involved in the March 10 incident, Deputies Smith, Woods, Guthrie, Catalan, and Busch. The court found good cause to conduct an in camera hearing of the personnel records of all five deputies on the issues of dishonesty and use of force. The court conducted the hearing and ordered disclosure of some discoverable materials to defense counsel. Appellant now requests that we conduct an independent review of the sealed *Pitchess* hearing to determine whether the court should have disclosed additional discoverable material.

The personnel records of peace officers are confidential and are subject to discovery only under limited circumstances. (§ 832.7.) Following a defendant's good cause showing setting forth the materiality of these records to the pending litigation, the court must conduct an in camera hearing to determine what information sought, if any, must be disclosed. (Evid. Code, § 1043, subd. (b)(3); *People v. Gaines* (2009) 46 Cal.4th 172, 179.) A criminal defendant is entitled to discovery of all relevant documents or

information in the confidential records of the peace officers, provided the information does not concern officer conduct occurring more than five years before the incident, the results of internal police investigations, or facts with no practical benefit to the defense. (See *People v. Gaines, supra*, at pp. 179, 182; see also Evid. Code, § 1045, subd. (b).) This information includes both evidence that would be admissible at trial and evidence that may lead to admissible evidence or evidence pertinent to the defense. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1048-1049; *City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.) A trial court is vested with broad discretion in ruling on a *Pitchess* motion, and we review the trial court's determination regarding the discoverability of material in peace officer personnel files for an abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228; *People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

We are authorized to conduct an independent examination of the in camera *Pitchess* proceedings to determine whether the trial court wrongly withheld any relevant materials. (*People v. Mooc, supra*, 26 Cal.4th at p. 1228.) We have reviewed the record of these proceedings, including a sealed reporter's transcript of the review of the deputies' personnel records. We conclude the trial court properly evaluated the materials and its orders concerning the disclosure of *Pitchess* materials were correct.

***2. Jury Instructions Concerning Resisting an Executive Officer (§ 69)***

Appellant contends that the trial court erred when it did not instruct the jury with a definition for "unlawful use of force or violence," a necessary element of the crime of resisting an executive officer (§ 69). As a result, appellant contends, he was prejudiced. We disagree.

**a. Background**

Section 69 "'sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer

in the performance of his or her duty.'"[3] (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 255, quoting *In re Manuel G.* (1997) 16 Cal.4th 805, 814.) Here, the prosecutor chose to prosecute appellant under the second prong: resisting an officer by force or violence in the performance of a duty. The trial court therefore instructed the jury with CALCRIM No. 2652 that the People had to prove: "1. The defendant unlawfully used force or violence to resist an executive officer; [¶] 2. When the defendant acted, the officer was performing his lawful duty; [¶] AND [¶] 3. When the defendant acted, he knew the executive officer was performing his duty."

The trial court also instructed the jury with CALCRIM No. 2656[4] on the lesser included offense of resisting a peace officer (§ 148, subd. (a)). In this instruction, the court explained the prosecution alleged that appellant resisted for purposes of this offense by "remaining rigid" while deputies tried to handcuff him, attempting to flee, and "bucking and turning while the deputies were trying to subdue him." The jury also received a detailed instruction, through CALCRIM No. 2670, on the lawful performance of a peace officer's duties. CALCRIM No. 2670 included instructions on appellant's right to use reasonable force to defend himself in response to an officer's use of unreasonable force.

Appellant contends that there was a potential for juror confusion because the prosecutor urged the acts "described in the instruction for the lesser offense of willful resistance without force or violence (§ 148, subd. (a))" were the very acts that could

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[3] Section 69 states: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment."

[4] CALCRIM No. 2656 provides that the People must prove the peace officers were lawfully performing their duties, the defendant willfully resisted, obstructed, or delayed those officers, and the defendant knew or should have known that the officers were performing their duties.

support a conviction for the greater offense of resistance by force or violence, except the prosecutor additionally pointed to evidence that appellant had kicked Deputy Woods to support a conviction on the greater offense. Moreover, appellant contends, the prosecutor argued that appellant was guilty of the lesser offense only if the jury found he had not resisted and had not used force, but had just delayed the deputies by standing, doing nothing, or not permitting them to handcuff him. Appellant argues that this all created the potential for juror confusion about the terms "force" and "violence," and the court therefore should have instructed the jury on the specific definition of "unlawfully use[ing] force or violence" as it relates to CALCRIM No. 2652 and section 69.

**b. Analysis**

As an initial matter, appellant has forfeited this contention because he failed to preserve the issue for appeal. When an instruction is a correct statement of the law, the defendant's failure to request a clarifying instruction forfeits the claim of error on appeal. (*People v. Marks* (2003) 31 Cal.4th 197, 237.) Further, "'[t]he trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel.'" (*People v. Kelly* (1992) 1 Cal.4th 495, 535.) The court's instructions were consistent with CALCRIM Nos. 2652 and 2656, standard form jury instructions. The instructions also closely tracked the language of the statutes. Appellant did not object at all to the instructions as given, much less request a modification or further definition of unlawful use of force or violence. He contends instead that the trial court had a sua sponte duty to define unlawful use of force or violence, thereby negating his obligation to have objected or requested a modification. It is true that a court has a sua sponte duty to define terms when they have a technical meaning peculiar to the law. (*People v. Howard* (1988) 44 Cal.3d 375, 408.) On the other hand, when the terms are commonly understood and not used in a sense unique to the law, the court has no such duty. (*Ibid*.) Appellant has not cited any authority demonstrating that CALCRIM No. 2652 uses "unlawfully used force or violence" in a way that differs from their nonlegal meaning. We agree with respondent that these words

have no special meaning that required a sua sponte instruction. Appellant has forfeited his contention.

Even if appellant had not forfeited his contention, we would hold the trial court did not err. "Questions relating to the validity and impact of the instructions given to the jury are entitled to de novo review. We review the instructions independently because the underlying question is one of law and the application of legal principles." (*People v. Burch* (2007) 148 Cal.App.4th 862, 870.) As already noted, the instructions were correct in law and standard. (See *People v. Kelly*, *supra*, 1 Cal.4th at p. 535 ["[W]e find no error. The standard instruction correctly and adequately explained the applicable law to the jury, and the court was not required to rewrite it sua sponte."].) Appellant contends there was error only because the prosecutor's arguments created a potential for confusion. But when the trial court properly instructs the jury on the law, "we presume the jury followed those instructions." (*People v. Boyette* (2002) 29 Cal.4th 381, 436.) Indeed, the court instructed the jurors that, to the extent they believed the attorneys' comments on the law conflicted with the court's instructions, they had to follow the court's instructions. (*Ibid.*) Appellant's argument fails to persuade.

***3. Admissibility of the 911 Call***

Appellant next challenges the trial court's decision to admit the recording of Anderson's 911 call as a spontaneous statement or utterance pursuant to Evidence Code section 1240. He argues that because Anderson was not under the stress of excitement, the call did not qualify as a spontaneous statement exception to the hearsay rule. He further contends that the trial court's decision to admit the 911 call prejudiced him at trial. We disagree and hold the court properly admitted the evidence.

**a. Background**

At the close of the prosecution's case-in-chief, the court played for the jury a recording of Anderson's 911 call, which was approximately four minutes in length. The call transpired as follows:

"OPERATOR: 911, what's your emergency?

"OPERATOR 2: CHP with a transfer.

"OPERATOR: Yes.

"MR. ANDERSON: Yeah, (inaudible).

"OPERATOR: I'm sorry?

"MR. ANDERSON: (inaudible)

"OPERATOR: Ok, your [*sic*] gonna have to speak up. I cannot hear you at all.

"MR. ANDERSON: I said the suspect is (inaudible). He's my nephew and he's back in my house again. (inaudible)

"OPERATOR: Ok, I, I can't hear you at all. You said your nephew's at your house?

"MR. ANDERSON: Yeah, he already terrorized my house already.

"OPERATOR: Ok, does he live there?

"MR. ANDERSON: No.

"OPERATOR: Is he there now?

"MR. ANDERSON: Yeah, I need someone to come right away.

"OPERATOR: Ok, I need an address.

"MR. ANDERSON: 2335 West Avenue J.

"OPERATOR: Is it a house or an apartment?

"MR. ANDERSON: Apartment D.

"OPERATOR: What's the name of the apartment complex?

"MR. ANDERSON: The Regency.

"OPERATOR: And that's 2335 West Avenue J?

"MR. ANDERSON: 2335 West . . .

"OPERATOR: Ok, is that a yes or a no? 2335?

"MR. ANDERSON: 2335 West Ave. J.

"OPERATOR: Ok, so that's what I'm saying. 2335.

"MR. ANDERSON: Yeah.

"OPERATOR: Correct? West Ave. J, Apartment D as in David?

"MR. ANDERSON: Yeah (inaudible).

"OPERATOR: How old is your nephew?

"MR. ANDERSON: (inaudible) I cant [*sic*] keep on talking (inaudible)

"OPERATOR: Ok, well, I'm not going to send deputies in blind. I need to get all the information first.

"MR. ANDERSON: I say he's like 28.

"OPERATOR: What's your name?

"MR. ANDERSON: Huh?

"OPERATOR: What's your name?

"MR. ANDERSON: My name is Kevin Anderson.

"OPERATOR: Anderson?

"MR. ANDERSON: Ma'am, I keep on talking to you. I already said what I got to say so if you gonna keep elaborating on it, I'm just gonna hang up. (inaudible)

"OPERATOR: Well these are questions I have to get for the deputies. These are necessary questions. I'm gonna send deputies out there but not until I have these questions answered.

"MR. ANDERSON: Ma'am . . .

"OPERATOR: So if you hang up on me, then you're telling me you don't want us out there.

"MR. ANDERSON: Ma'am, he's gonna get up right now.

"OPERATOR: Do you want us to respond?

"MR. ANDERSON: Ma'am I already told you, I already told you and your phone should be monitored.

"OPERATOR: Yes it is. Every word of this is being recorded.

"MR. ANDERSON: (inaudible) If something happens to me, you heard, everybody hear (inaudible)

"OPERATOR: Do you need us to respond?

"MR. ANDERSON: I'll say yes.

"OPERATOR: What is your phone number?

"MR. ANDERSON: 310-801-8349.

"OPERATOR: Ok, what is he doing right now?

"MR. ANDERSON: He's knocking over s---, he's talking s---, (inaudible) . . .

"OPERATOR: He's knocking stuff over in the house?

"MR. ANDERSON: Yes. When the police come, tell them to knock on the door. Don't bust the door down. Tell them just knock on it, ok?

"OPERATOR: What's your nephew's name?

"MR. ANDERSON: Anthony.

"OPERATOR: What's he wearing?

"MR. ANDERSON: He has some red on. He's laying down now.

"OPERATOR: And you're gonna answer the door when deputies get there?

"MR. ANDERSON: Yeah (inaudible).

"OPERATOR: What was your first name again? I can't hear you.

"MR. ANDERSON: Kevin. I'm (inaudible).

"OPERATOR: Your, your first name?

"MR. ANDERSON: Ma'am, I'm tired of talking (inaudible).

"OPERATOR: Ok, these are necessary questions Kevin, ok?

"MR. ANDERSON: Ok, I said my name is Kevin. Tell the deputies to knock on the door, don't bust . . .

"OPERATOR: Alright, I'll get deputies over there.

"MR. ANDERSON: (inaudible)

"OPERATOR: Ok, alright. I'll have deputies come over, ok?"

During the trial, the prosecutor moved in limine to admit the 911 call as an excited utterance hearsay exception, arguing that the transcript of the call indicated an ongoing emergency when "a person who's not supposed to be in the house is currently in the

house." Moreover, the prosecutor stated, there is "the fact that the person needs assistance because the person who's not supposed to be there is throwing things and breaking things currently." Defense counsel opposed the motion, responding that "at the time of the call, the caller actually advised that [appellant] was laying down asleep at the moment the caller was talking to the operator," implying that the caller was not still under the stress of excitement. Defense counsel also objected on the ground that the call's probative value was substantially outweighed by its prejudicial effect.[5] The court granted the prosecutor's motion.

**b. Analysis**

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "'The foundation for this exception [to the hearsay rule] is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.] [¶] The basis for this circumstantial probability of trustworthiness is "that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief."' [Citation.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

In order for a hearsay statement to be admissible as a spontaneous declaration, there must be evidence showing "'(1) . . . some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers

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[5] Defense counsel also objected on relevance grounds, but appellant does not raise that argument on appeal.

to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi*, *supra*, 45 Cal.3d at p. 318.)

"The crucial element in determining whether an out-of-court statement is admissible as a spontaneous declaration is the mental state of the speaker." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 811.) "The nature of the utterance -- how long it was made after the startling incident and whether the speaker blurted it out, for example -- may be important, but solely as an indicator of the mental state of the declarant." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, overruled on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) Whether the requirements of the spontaneous statement exception are satisfied is largely a question of fact. (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 73.) "We will uphold the trial court's determination if its resolution of factual questions is supported by substantial evidence. [Citation.] We review for abuse of discretion the ultimate decision whether to admit the evidence." (*Ibid.*)

Here, the trial court found that the 911 call qualified as a spontaneous statement exception to the hearsay rule because it was a call "involving relatively contemporaneous events." We agree. Anderson called 911 while his nephew, appellant, was still in Anderson's house. The tape indicates that Anderson made the call under the stress of excitement, and without time to reflect and contemplate his words. Anderson noted that as he was talking to the 911 operator, appellant was "knocking over s---" and "talking s---." Anderson also stated that, "If something happens to me, you heard . . . ," indicating that he feared for his safety at the time of the call. In sum, the circumstances indicated that Anderson's statements were made spontaneously, they related to the incident as he perceived it, and they were made without time to contrive or misrepresent appellant's actions.[6]

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[6] Appellant argues that the fact that the police took nearly half an hour to arrive at Anderson's apartment indicates that they did not view his situation as worthy of stress of excitement. However, as appellant himself notes, it is the mental state of the declarant

In any event, we cannot say that the admission of the 911 call prejudiced appellant under *People v. Watson* (1956) 46 Cal.2d 818, 836-837, the harmless error standard applicable to error in the admission of hearsay. (*People v. Duarte* (2000) 24 Cal.4th 603, 618-619.) Appellant contends that Anderson's statement that appellant was knocking over things was significant enough to bias the jury against him and lead to a less favorable verdict. But the deputies' detailed testimony about appellant's actions were far more negative and incriminating. Deputy Woods testified that appellant "was constantly kicking at [his] hands" and upper body. Deputy Smith said each time he attempted to put appellant's hands behind his back, appellant would struggle and turn such that Smith could not handcuff him. Smith repeatedly told appellant to stop fighting. Appellant threw Smith off of him and temporarily escaped. Once the deputies found appellant in the trailer, Deputy Guthrie said appellant pushed against Deputy Busch and then against Guthrie as they struggled to control him. Appellant overpowered both Deputies Busch and Guthrie. Deputy Catalan grabbed appellant's right arm but was not able to secure it due to appellant's struggling. Given the detailed testimony about appellant's actions toward the deputies, it is not reasonably probable that the jury would have reached a more favorable verdict in the absence of the 911 call.

***4. Admissibility of Evidence That Appellant Was Subject to an Arrest Warrant***

Appellant contends that the trial court abused its discretion in admitting evidence that appellant had a warrant for his arrest at the time of the instant incident. Over appellant's objection on grounds of relevance and undue prejudice, the trial court allowed the prosecutor to present evidence that appellant was subject to a warrant to show that he had a motive to resist arrest. After the ruling, defense counsel agreed to stipulate that there was a warrant for appellant at the time of the incident in order to minimize the effect of the evidence. The court gave a limiting instruction to the jury as follows: "The existence of a warrant is not evidence that anyone committed a crime or that anyone is a

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that is dispositive, not the apparent thoughts of others. (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 809.)

particularly [*sic*] or someone is inclined to commit crimes. [¶] The only reason that you're allowed to consider that evidence is as it relates to a possible motive for the crimes charged in the case." Appellant contends that the prejudicial effect of evidence of the arrest warrant substantially outweighed its probative value. We disagree.

A trial court may admit evidence that a person committed a crime or other act "when relevant to prove some fact . . . such as motive . . . other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b); see also *People v. Terry* (1970) 2 Cal.3d 362, 396.) Evidence code section 352 allows a court to exclude otherwise admissible evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." We review the trial court's decision to admit evidence of the arrest warrant for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

We conclude that evidence of appellant's arrest warrant was admissible because it was probative of his motive for resisting arrest. (See, e.g., *People v. Durham* (1969) 70 Cal.2d 171, 189 [evidence of defendant's parole status and criminal activities in weeks leading up to charged murder probative of motive for killing of police officer]; *People v. Robillard* (1960) 55 Cal.2d 88, 95, 100, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631, 648-649 [evidence that defendant had committed prior uncharged crimes probative of motive to kill officer who detained him on suspicion of driving a stolen car, insofar as defendant wanted to avoid apprehension and long prison term].) Furthermore, the prejudicial effect of this evidence did not substantially outweigh its probative value. """Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. . . . "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. . . .['"] . . . ["'T]he statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' [Citation.]"" (*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, citations

omitted.) The evidence consisted of a one-sentence stipulation, read to the jury, that "there was a warrant for [appellant] at the time of the charged incident." There was no information about what sort of charge the warrant involved. In addition, as mentioned above, the trial court also gave the jury a limiting instruction that the evidence should only be considered as to motive. The trial court could have reasonably concluded that the bare evidence of an arrest warrant would not "so inflame the emotions of the jurors that they would '"reward or punish one side because of the jurors' emotional reaction."' [Citation.]" (*People v. Leon* (2010) 181 Cal.App.4th 452, 462.)

***5. Presentence Conduct Credits***

Appellant contends he is entitled to an additional six days of conduct credits under the version of section 4019 that went into effect while he was in presentence custody. We disagree.

Appellant was arrested on March 10, 2011, and sentenced on October 12, 2011. On October 1, 2011, section 4019 was amended pursuant to the Criminal Justice Realignment Act of 2011. The prior version of section 4019, subdivision (f) provided: "It is the intent of the Legislature that if all days are earned under this section, a term of six days will be deemed to have been served for every four days spent in actual custody." The current, amended section 4019, subdivision (f) provides: "It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody."

Although the court sentenced appellant after section 4019 was amended, subdivision (h) of the statute provides: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail . . . *for a crime committed on or after October 1, 2011*. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (Italics added.) Appellant committed his crime prior to October 1, 2011, and he was thus entitled to credits at the lower rate of only two days for every four days spent in custody. Nevertheless, appellant contends that he should accrue credits at

the current enhanced rate under amended section 4019 for the time he spent in custody between October 1, 2011 (the effective date), and his sentencing on October 12, 2011.

We agree with our colleagues in *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1550 (*Ellis*) and adopt that court's reasoning to reject appellant's claim. As explained in *Ellis*, at page 1553, "the Legislature's clear intent was to have the enhanced rate apply *only* to those defendants who committed their crimes on or after October 1, 2011. (See *People v. Lara* [(2012)] 54 Cal.4th [896,] 906, fn. 9.) The second sentence [of section 4019, subdivision (h)] does not extend the enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits. So read, the sentence is not meaningless, especially in light of the fact the October 1, 2011, amendment to section 4019, although part of the so-called realignment legislation, applies based on the date a defendant's crime is committed, whereas section 1170, subdivision (h), which sets out the basic sentencing scheme under realignment, applies based on the date a defendant is sentenced." (See also *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 52 ["As we explain above, [section 4019,] subdivision (h)'s first sentence reflects the Legislature intended the enhanced conduct credit provision to apply only to those defendants who committed their crimes on or after October 1, 2011. Subdivision (h)'s second sentence does not extend the enhanced conduct credit provision to any other group, namely those defendants who committed offenses before October 1, 2011, but are in local custody on or after October 1, 2011. Instead, subdivision (h)'s second sentence attempts to clarify that those defendants who committed an offense before October 1, 2011, are to earn credit under the prior law."].)

Because appellant was convicted of a crime committed before October 1, 2011, the trial court properly sentenced him under former section 4019. Accordingly, his presentence custody award of 325 days, consisting of 217 days of actual credit and 108 days of conduct credit, was not error.[7]

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[7] In his reply brief, appellant argues for the first time that principles of equal protection require that he earn enhanced conduct credits under the current version of the

***6. Fees and Fines***

Respondent contends that the abstract of judgment should be amended to reflect the correct fees and fines. Specifically, respondent asserts that the trial court should have imposed a $200 court operations fee, rather than the $150 amount actually imposed, as well as a $150 court facilities fee. We agree.

Section 1465.8, subdivision (a)(1) provides in pertinent part: "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense . . . ." The assessment should be imposed for each count on which a defendant was convicted. (*People v. Roa* (2009) 171 Cal.App.4th 1175, 1181.) As appellant was convicted of five counts, the court should have imposed a total assessment of $200. However, the court imposed an assessment of only $150 under section 1465.8. At any time, we may correct obvious legal errors in sentencing that are correctable without reference to factual findings. (*People v. Smith* (2001) 24 Cal.4th 849, 852-854.) Accordingly, the abstract of judgment should be amended to reflect a court operations assessment of $200 under section 1465.8.

Government Code section 70373, subdivision (a)(1) provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony . . . ." The trial court did not impose a court facilities fee. This fee should also be imposed for each count on which a defendant was convicted. (*People v. Lopez* (2010) 188 Cal.App.4th 474, 480.) Accordingly, the abstract of judgment should be amended to also reflect a court facilities assessment of $150 under Government Code section 70373.

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statute. Absent a showing of good cause, we will not address points raised for the first time in a reply brief, because the respondent has not been given a chance to respond. (*People v. Adams* (1990) 216 Cal.App.3d 1431, 1441, fn. 2.) Appellant has not shown good cause.

## DISPOSITION

The trial court is directed to prepare an amended abstract of judgment to reflect a $200 court operations fee under Penal Code section 1465.8 and a $150 court facilities fee under Government Code section 70373. The court shall forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.